

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT & CONSERVATION

DEPT OF ENVIRONMENT AND CONSERVATION
OFFICE OF GENERAL COUNSEL

JUN 11 2008

RECEIVED

IN THE MATTER OF:)

J.J. DETWEILER ENTERPRISES, INC.)

and)

HORST BROTHERS)
CONSTRUCTION, LLC)

Respondents)

DIVISION OF WATER
POLLUTION CONTROL

Case No. 06-0231*

PETITION FOR REVIEW AND HEARING

Pursuant to the Tennessee Uniform Administrative Procedures Act, T.C.A. §§ 4-5-301, *et seq.*, and the Tennessee Water Quality Control Act, T.C.A. §§ 69-3-101, *et seq.* (the "Act"), including in particular §§ 69-3-109, 69-3-110, 69-3-115 and 69-3-116, Petitioner, **Horst Brothers Construction, LLC**, hereby objects to the Director's Order and Assessment, Case No. 06-0231, dated May 13, 2008 (the "Order"), appeals the Order and the assessments and orders contained therein, and requests a hearing on this matter before the Tennessee Water Quality Control Board.

Petitioner seeks review of the assessment of civil penalty assessed in the Order on the grounds that:

- (a) the facts and violations alleged in the Order are in error, particularly as relates to the obligations and actions of Petitioner;

* A Director's Order and Assessment in this matter was issued on December 6, 2006, was appealed by Petitioner and J.J. Detweiler Enterprises, Inc., and was assigned Case No. 06-0231. That Director's Order and Assessment was thereafter withdrawn, terminating that contested case. The Tennessee Department of Environment and Conservation has apparently assigned the same case number to this Order. Petitioner has no objection to that.

(b) in light of all relevant facts and circumstances, (i) the civil penalty assessed in this matter is unreasonable and excessive, and (ii) the factors that may be considered under T.C.A. §69-3-115(a)(3) when assessing a civil penalty do not support the imposition of this civil penalty; and

(c) the Order cites various alleged violations without distinguishing between which are alleged to have been committed by Petitioner and which by the other respondent, J.J. Detweiler Enterprises, Inc. ("Detweiler"), and assesses a single penalty jointly against the two when in fact the responsibilities and actions in this matter, including the factors that may be considered under T.C.A. §69-3-115(a)(3) when assessing a civil penalty, are very different for these two entities.

Relevant facts include, without limitation, (1) the fact that pursuant to its contract with the project developer (Detweiler), Petitioner was not responsible for obtaining required ARAP or other permits from the Division of Water Pollution Control (the "Division"), for any other required filings with the Division, for preparing required SWPPPs or other plans, or for installing or maintaining required erosion control measures, (2) the fact that most of the Notices of Violation sent by the Division in this matter were sent only to Detweiler and not to Petitioner, and (3) the facts and considerations stated in the letter from Petitioner's counsel to the Attorney General's office with respect to this matter dated October 25, 2008, a copy of which is attached hereto, and (4) the fact that, except for contingent penalties with respect to contingencies that did not occur, the penalty assessed by the Order is in the exact same amount as the penalty assessed by a prior Director's Order and Assessment dated December 6, 2006, with respect to these exact same alleged violations, which was later withdrawn, even though the factors to be considered pursuant to T.C.A. §69-3-115(a)(3) are very different now with respect to Petitioner, especially

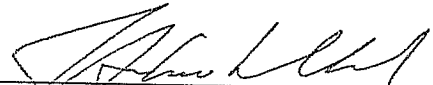
the factor relating to effectiveness of action taken by the violators cease the violation and the economic benefit gained by the violator.

The foregoing is not an exhaustive list of the grounds and reasons for Petitioner's objections to the assessment of the civil penalty assessed by the Order. Petitioner reserves the right hereafter to raise additional grounds and reasons by amendment of this Petition or otherwise.

Pursuant to the Act, Petitioner is not required to state grounds and reasons for its objections to assessment of damages to the state. Petitioner reserves the right hereafter to raise grounds and reasons for such objections by amendment of this Petition or otherwise.

DATED this 9th day of June, 2008.

Respectfully Submitted,

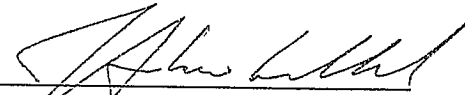


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(615) 742-6224

Attorneys for Petitioner,
Horst Brothers Construction, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by hand delivery upon James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, c/o Division of Water Pollution Control, 6th Floor, L & C Annex, 401 Church Street, Nashville, Tennessee 37243-1534 and by mail at c/o Office of General Counsel, Attention: Devin M. Wells, 25th Floor, William R. Snodgrass Bldg., 312 8th Avenue North, Nashville, TN 37243-1548, and a copy has been mailed to T. Michael O'Mara, O'Mara & Johnson, P.L.L.C., 317 West Spring Street, Cookeville, Tennessee 38501, counsel for J.J. Detweiler Enterprises, Inc., on the 9th day of June, 2008.



J. Andrew Goddard

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BASS, BERRY & SIMS PLC
Attorneys at Law

A PROFESSIONAL LIMITED LIABILITY COMPANY

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October 25, 2007

Sohnia W. Hong
Assistant Attorney General & Reporter
Tennessee Attorney General's Office
Cordell Hull Building, 2nd Floor
425 5th Avenue North
Nashville TN 37243-0488

Re: Horst Brothers Construction LLC

Dear Sohnia:

As you know, this firm represents Horst Brothers Construction LLC ("Horst Brothers") with respect to various matters, including water pollution enforcement matters related to the Wilder Mountain development of J. J. Detweiler, Inc. ("Detweiler").

You have offered the opportunity for Horst Brothers to submit facts and circumstances which it believes mitigate against significant enforcement action being taken by the State of Tennessee against Horst Brothers in connection with the Wilder Mountain development. Horst Brothers appreciates that opportunity.

I would first note that Horst Brothers and Detweiler are in very different situations, both legally and factually. The mitigating factors set forth below are with respect to Horst Brothers, and Horst Brothers does not suggest that the same factors apply with respect to Detweiler.

Horst Brothers submits the following facts and circumstances for consideration in this regard:

1. The Wilder Mountain development is a development of Detweiler and not Horst Brothers. Further, the general contractor for this development is Detweiler, and not Horst Brothers. Horst Brothers was a subcontractor hired solely to do grading of certain roads in the development. Importantly, the contract with Horst Brothers specifically provides that "[Horst Brothers] is not responsible for engineering, design, filing and filing fees of Storm Water Pollution and Prevention Plan (SWPPP) with the State of Tennessee, nor is [Horst Brothers] responsible in above quoted price for furnishing and/or installing required erosion control means and measures as specified in the SWPPP or other agencies being they state, county or local.

[Horst Brothers] is also not responsible for maintenance of erosion control materials including, but not limited to, silt fence, sediment basin, trap, rip rap, check dams, straw or hay bale check dams. [Detweiler] also agrees to hold [Horst Brothers] harmless in any litigation involving failures of said erosion control measures and any fines that might be levied by state, county or local authorities and are not limited to causes by reckless or malicious intent." From this contract it is clear that (i) Horst Brothers was neither the general contractor, nor the erosion control subcontractor, for the development, (ii) Horst Brothers did not agree to be responsible for erosion control matters, and (iii) Detweiler was both the owner of and general contractor for the development.

2. Of the nine NPDES, ARAP and storm water construction permit applications and notifications that were filed with TDEC and the Corps of Engineers, Horst Brothers was listed as "contractor" only on the revised application for NPDES permit TNR170472. All the other applications, including the original application for NPDES permit TNR170472, identify either Detweiler or Dan Graber as the contractor, or show no contractor. (It is our understanding that Mr. Graber is Detweiler's project manager for the Wilder Mountain project.) In fact, in correspondence from the Division's Cookeville Field Office to Detweiler dated January 30, 2006 (copy enclosed), the Division noted that no contractor was identified on an NOI and stated that "a primary contractor, or contractor otherwise responsible for sediment and erosion control matters on the construction site, must be identified and must submit an NOI to this office prior to beginning earth clearing operations on the site." This is consistent with identifying the contractor responsible for sediment and erosion control matters, which could either be the general contractor (which is responsible for the work of all of its subcontractors) or the sediment and erosion control contractor. Horst Brothers was not either of these with respect to the Wilder Mountain development.

As for the one application that was signed by Horst Brothers as contractor, as noted above it was originally submitted signed only by Detweiler. Horst Brothers later signed an amended application for this permit, but only because it was advised by Jeff Patten, of the Division's Cookeville Field Office, that it should do so. In fact, this was an incorrect interpretation of the rule. Horst Brothers was not the contractor for this work, but was instead a subcontractor whose work was limited to road grading. Horst Brothers should not be considered as the general contractor for this site, or in any way penalized for that status, when the only reason it has executed a document stating this is that it was seeking to cooperate with the Division by following the directions of a Division employee. In hindsight, we believe that Mr. Patten was likely under the misimpression that Horst Brothers was the sediment and erosion control contractor for the site, which is not correct. If it would be helpful, Horst Brothers would be more than willing to file an amendment to this application stating that it should not be listed as contractor.

3. There has been some significant misunderstanding with respect to the condition of the relevant "waters of the state" prior to beginning of the work by Horst Brothers. Most of the road construction in the Wilder Mountain Development by Horst Brothers consisted of grading existing logging roads that had not been used for logging for years. These existing logging roads were poorly constructed (Horst Brothers had nothing to do with constructing them), and in many

cases streams and intermittent streams crossing them had washed out significant portions of the roads at these crossings. This had apparently been exacerbated by four-wheeler and ATV traffic.

The result of all of this prior activity is that where these streams and intermittent streams crossed the road beds, significant washout had occurred across the road bed, and in many places significant washout had occurred on the downstream side of the roadbed where flowing water would drop after exiting the roadbed. This was the condition of the streams and intermittent streams at these roadbeds when culverts were placed by Horst Brothers. The placement of these culverts was at the elevations of the existing streams and intermittent streams, and the downstream washout at these locations after heavy rains, merely continued an existing condition. It is understandable that after the fact it would appear that the culvert installation caused these washouts, but in fact this condition existed prior to the placement of these culverts. The applicable permits did not require improvement of the streams and intermittent streams at these road crossings, merely that they not be adversely affected. Given this, the culverts were placed properly given these conditions, and the washouts on the downstream side of the roads are no greater than prior to placement of these culverts.

Rather than continue to contest the Notices of Violation issued for this, however, Horst Brothers has armored many of these sections of streams and intermittent streams to reduce or eliminate these washouts. This work has caused these streams to be in substantially better condition than prior to any work by Horst Brothers in this development. This work was not required, and the fact that Horst Brothers has done this work should count as a significant mitigating factor in this matter.

4. Horst Brothers did not contract to implement, nor was its compensation under the contract designed to cover, any erosion control measures. Despite this, and following our meeting with you and others earlier this year, Horst Brothers agreed with Detweiler to do the work you demanded relating to armoring of streams and some of the work relating to sediment removal and fill stabilization, with the express agreement that Detweiler would, through its erosion control subcontractor, implement all other required erosion control measures. As work progressed, the erosion control subcontractor left the job on several occasions. On each occasion Horst Brothers inquired about this and was informed by the subcontractor that it was not being paid by Detweiler. Finally, Horst Brothers agreed with that same erosion control subcontractor that Horst Brothers would pay it to finish the job, and only then did it complete the work. The fact that this work was done promptly, was done well, and was done cooperatively with the Division is a significant mitigating factor that inures almost wholly to the benefit of Horst Brothers and not Detweiler. As a result, in addition to its compensation under its road grading contract, Horst Brothers has incurred over \$150,000 of which over \$20,000 was in payments to the erosion control subcontractor for its work. Horst Brothers has to date been unsuccessful in getting Detweiler to reimburse it for the vast majority of these costs.

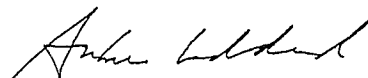
5. It is our understanding that it is the current policy of the Division and the Attorney General's office to refer for civil suits initiated by the Attorney General the worst cases of repeated noncompliance. That may be the case regarding Detweiler, but that is not the case with respect to Horst Brothers. Specifically, Horst Brothers has been involved in at least 32

grading and site development projects in the State of Tennessee in the past four years that involved construction storm water permitting. All have been inspected by the Division. Other than the Wilder Mountain development, only three have resulted in any Notices of Violation. The other 28 projects involved no NOV regarding Horst Brothers' work whatsoever. This is simply not the case of a significant, repeat violator.

In two of these (the Gibbs Elementary School and Monteagle Green Apartments projects) the NOVs involved silt fences that had been blown down by a heavy rain and mud therefrom. The fences were promptly replaced, and no other enforcement action was taken. In the third of these (the Nichol Creek Farms project), the NOV involved a project where, like the Wilder Mountain development, Horst Brothers was a clearing subcontractor but was not the contractor for sediment and erosion control measures or road grading. (The Nichol Creek developer improperly listed Horst Brothers as contractor on the stormwater NOI, which was not signed by Horst Brothers). The NOV there was for not having obtained a storm water permit and not having adequate erosion control measures in place. The penalty assessed was \$17,500.00, of which \$14,000.00 was contingent and only \$3,500.00 was required to be paid. None of these enforcement actions reflect any assessment by the Division that there were significant violations, at least in light of the several multi-hundred thousand dollar penalties that have been assessed by the Division in cases of significant noncompliances in development projects.¹

Based on the foregoing, Horst Brothers submits that there are strong factors mitigating against significant enforcement against Horst Brothers. Specifically, I would submit that a lawsuit by the Office of the Attorney General, which by policy is reserved for repeat offenders who cannot be brought into compliance by Commissioner's Order, is not an appropriate action with respect to Horst Brothers. Further, almost all of the above mitigating factors for Horst Brothers are either not present, or present only to a significantly lesser degree, with respect to Detweiler. Accordingly, it would be inequitable, and inconsistent with the provisions of the Tennessee Water Quality Control Act stating of mitigating factors to be considered in making enforcement decisions, to have the same enforcement apply to both Horst Brothers and Detweiler. If any enforcement action is to be taken against Horst Brothers, it should be a Commissioner's Order. Such an order should be separate from whatever enforcement action is taken against Detweiler and should be in a much lower penalty amount than was assessed in the now withdrawn Commissioner's Order that was originally issued in this matter to both Detweiler and Horst Brothers.

Sincerely,



J. Andrew Goddard

¹ The notice of violation in that matter (which was issued only to the site owner and not to Horst Brothers) was issued on October 23, 2006, and the enforcement order was issued on December 27, 2006.

Sohnia Hong
October 25, 2007
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JAG:cgf
cc: Paul Horst
E. Joseph Sanders